Filed 5/5/06 In re E.K. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re E.K. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. L.K., Defendant and Appellant.	C050497 (Super. Ct. Nos. JD222228 & JD222229)

L.K., father of the minor E.K., appeals from the judgment of disposition. (Welf. & Inst. Code, §§ 358, 360, 395.)[1] Appellant contends the juvenile court erred in excluding testimony from a family law mediator, and that substantial evidence did not support the juvenile court's findings that (1) there was a substantial danger to the minor if returned to

[1] Further undesignated section references are to the Welfare and Institutions Code.

his custody; and (2) it was in the minor's best interests to award sole legal custody to the minor's mother. We affirm.

FACTS

In April 2005, the Department of Health and Human Services (DHHS) removed the minors, E.K., age 3, and A.K., age 12, from parental custody based upon allegations of appellant's ongoing physical abuse of A.K. and his history of domestic violence in the home toward G.K., the minors' mother, in the minors' presence.[2]

G.K. left appellant in 2004 because of appellant's violence and moved to the east coast. Appellant subsequently filed for divorce. As a part of the family law proceedings, a mediation was conducted regarding child custody. Appellant was granted full legal and physical custody in March 2005 and G.K. returned the minors to California. Upon their return, G.K. and A.K. reported appellant's abuse and following an investigation, DHHS filed a petition in the juvenile court.

Appellant insisted he was the biological father of both minors. He denied he physically abused A.K., asserting A.K. was brainwashed by G.K. and that allegations of abuse were completely fabricated by G.K.

When interviewed, A.K., who was very fearful of appellant, reiterated her claims of physical abuse by appellant and said

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[2] Appellant also appealed the juvenile court's order that he is not the father of A.K. Because he presents no arguments as to that issue, the appeal as to A.K. is dismissed.

that G.K. and appellant had frequent arguments which sometimes led to physical altercations. A.K. stated that appellant made her sleep in a closet and would buy things for E.K. but not for her. A.K. said appellant gave "favorable treatment" to E.K. and her stepbrothers. A.K. said she, E.K. and G.K. left California due to ongoing verbal and physical abuse by appellant. Police reports and call logs from 2002 and 2003 substantiated G.K.'s claims of abuse and domestic violence.

In May 2005, the juvenile court ordered the minors returned to G.K.'s custody with supervised visits for appellant. The court also took judicial notice of the custody orders in the family law case. Paternity test results excluded appellant as A.K.'s father.

Trial on jurisdictional and dispositional issues commenced in July 2005. After testimony began, appellant filed a trial brief in support of his witness list, which included the family law mediator, arguing the mediator's testimony would impeach G.K.'s credibility because G.K. did not tell the mediator that A.K. had been physically abused. A copy of the mediator's report was attached to the trial brief. DHHS asserted that the mediation privilege belonged to the parties. Upon the court's inquiry, G.K. claimed the privilege. The court declined to judicially notice the mediator's report both because it was not a proper subject of judicial notice and because it was privileged under Evidence Code section 1119. The court also excluded testimony of the mediator pursuant to Evidence Code section 703.5.

The DHHS investigator who prepared the jurisdictional and dispositional reports testified he was concerned that if E.K. was placed with appellant she would be at risk of abuse because of appellant's history of domestic violence, his physical abuse of A.K. and his penchant for using abuse and threats as a means of controlling G.K. The investigator was concerned that appellant's pattern of control through intimidation and force would extend to E.K. The investigator stated that when he interviewed A.K. about appellant's abuse, she did not appear to be coached. He did not believe that G.K. was lying about the domestic violence and abuse. He noted that the records of the police calls were corroborative of G.K.'s story.

Appellant's 20-year-old son, B.K., who had lived with appellant, the minors and G.K., testified there was a lot of arguing in the home. B.K. did not see any physical fights because he left the house when the arguments began. He stayed away when appellant and G.K. argued because he did not want to get involved and he was afraid. He confronted them about the arguments but nothing changed. B.K. testified that appellant punished him by withholding things and refusing to buy things that he needed. B.K. testified A.K. slept in a storage closet and she was present during arguments between appellant and G.K.

Appellant testified he did not hit A.K. and did not think she was afraid of him. Appellant further denied he ever hit G.K., insisting that their confrontations were only verbal. He testified he never demanded or coerced G.K. to have sex. Appellant asserted that the social worker, G.K. and A.K. were

not truthful and continued to insist that A.K. was his biological daughter despite a paternity test to the contrary. Appellant stated that G.K. left in April 2004 after he told her he was getting a divorce. He acknowledged there was some arguing before she left but stated that the minors were never present during the arguments and his son had never confronted him about them. He said he disciplined A.K. by denying her things she wanted.

G.K. testified she met appellant in 1998 when A.K. was six or seven years old. G.K. told the court that appellant's physical abuse had begun in Liberia and he would physically check her after she went out to see if she had engaged in sex with someone else. After they came to the United States, the abuse continued even when she was pregnant. Appellant would threaten her and rip her clothes if she refused to have sex with him. She said the police were called in May 2002 because appellant was physically abusing her; she told police at that time that he was also physically abusing A.K. A.K. was present during the incident. G.K. said the police came to the house many times because of the continuous fighting and that both she and appellant had called them. G.K. testified that appellant would try to convince the police that he was innocent. She also testified that in December 2003, appellant threatened to kill her. G.K. further testified she told appellant's brother and her friends that appellant physically abused A.K. G.K. described incidents of the ongoing physical abuse A.K. suffered at appellant's hands.

The juvenile court concluded appellant was not A.K.'s father and ordered him to have no contact with her. The court sustained the petition as to A.K., but, finding she did not need the protection of the court, returned her to the custody of G.K. As to E.K., the court sustained the petition and proceeded to disposition.

In the dispositional hearing, the reunification social worker testified she had observed two visits in June 2005 and saw part of a third visit in July 2005 between E.K. and appellant. While the minor did not spontaneously offer affection to appellant, the social worker saw no risk to the minor during the visits and appellant did interact with the minor. Although parents were encouraged to bring snacks to visits and gifts in moderation were appropriate, the social worker was concerned that the minor was getting confused because visits were geared toward material things, with appellant using visit time to show the minor her presents and ask what she wanted the next time he came. According to the social worker, too many gifts are inappropriate because it sets expectations in the minor that could be used in a controlling fashion. The control element of gift giving was important because, according to the history of the case, appellant had used control of money and gifts to perpetrate abuse on family members. The social worker did discuss the issue of giving E.K. money and too many gifts with appellant and they "agreed to disagree" on the issue. The social worker testified that E.K. said she likes visits and appellant because of the things he brings her. Appellant had

demonstrated he can interact with E.K. appropriately but the gift-giving affects how she sees him. The social worker stated that E.K. has some anxiety about visits which decreases, but is not dissipated, during the visits.

The DHHS investigator testified E.K. was at risk of the same abuse suffered by A.K. because of appellant's pattern of interaction with female family members. There was no evidence that G.K. had placed E.K. at risk during the year they lived out of state. If E.K. were to remain in California instead of being returned to G.K., the investigator would recommend foster care placement with services for appellant.

Appellant testified he was able to provide care and support for E.K. and would not place her at risk. He expressed concern that G.K. was not able to care for E.K. and keep her safe.

Appellant was asked about an incident which occurred in the courthouse following the previous court session. He stated that G.K. started talking to him; that she used profanity and insulted him and his family before he responded to her. G.K. then testified that she did not say anything to appellant after court--that he had started yelling at her, making threats and calling her names, and she felt threatened and afraid. The investigator testified he was present during the disturbance, which involved appellant yelling at G.K., who was on the telephone. The investigator described the incident and stated appellant's attorney tried to diffuse the situation. G.K. was visibly shaken when appellant left the area, and the investigator invited her to walk out of the courthouse with

the social workers and attorneys. When the group reached the lobby, appellant was present, and the investigator positioned G.K. within the group and escorted her to the welfare offices to wait for her ride. In his assessment, G.K. needed the escort out of the building.

The court found E.K.'s removal was required because there was, or would be, a substantial danger to her physical health if returned to appellant and there was no reasonable means to protect her. The court listed several facts in support of its finding: the physical abuse of A.K.; the sexual and financial manipulation of G.K.; the history of domestic violence against G.K. witnessed by the minors; the manipulation of A.K. and B.K.; the denigration and habitual debasement of G.K.; and the consistent unrelenting refusal of appellant to accept any responsibility for his conduct. The court further noted appellant's credibility was questionable, A.K. showed obvious fear when appellant's name was mentioned, and the court had observed G.K.'s fear of appellant. The court stated it was a matter of time before E.K., now the favored child, displeased appellant and would be at the forefront of risk. The court ordered E.K. removed from appellant but found there was not clear and convincing evidence to support removal from G.K. In concluding it was appropriate to place E.K. with G.K., the court found that E.K. recognized G.K. as her parent, G.K. was more than an adequate caretaker, G.K. was not responsible for injury to E.K., G.K. had removed herself and her children from a household of domestic violence, and G.K. had kept E.K. safe and

had cooperated with DHHS. The court found that awarding sole custody to G.K. was in E.K.'s best interests based upon appellant's physical abuse of A.K., the violence appellant perpetrated on G.K. in the minors' presence, and the fact that E.K.'s sibling is in G.K.'s custody.

DISCUSSION

I

Appellant contends the juvenile court erred in excluding the family court mediator's testimony and report because the evidence was relevant and the statutes upon which the court relied in refusing to permit the mediator to testify did not apply.[3]

Appellant sought to have the family court custody and visitation mediator testify to impeach the mother's credibility; specifically, to testify that the mother did not inform the mediator that appellant had physically abused the minor until after the mediator had recommended that appellant receive custody of the minors. The juvenile court ruled that the proffered evidence was inadmissible pursuant to Evidence Code section 1119. This was error.

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[3] Although the discussion at trial addressed both the mediator's testimony and report and the report was attached to appellant's motion, the motion sought only to have the mediator testify. To the extent that appellant challenges the juvenile court's refusal to judicially notice the mediator's report, the challenge fails. The court correctly observed that the report did not contain matters which were the proper subject of judicial notice. (*People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127; *In re Tanya F.* (1980) 111 Cal.App.3d 436, 440.)

Evidence Code Section 1119 makes evidence of "anything said or any admission made . . . in the course of . . . a mediation" inadmissible in any civil action. (Evid. Code, § 1119, subd. (a).) However, pursuant to Evidence Code section 1117, this provision is not applicable to the mediation in question here, i.e., a mediation of custody and visitation under the Family Code. (Evid. Code, § 1117, subd. (b)(1).) Similarly, Evidence Code section 703.5, which states that a mediator is not competent to testify in any subsequent civil proceeding about statements in the prior proceeding, is specifically made inapplicable to mediators in family law mediation of custody and visitation.[4]

The statutory provision applicable to family law mediation of custody and visitation is found in Family Code section 3177, which states: "Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code."

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[4] Evidence Code section 703.5 states, in relevant part: "No . . . mediator[] shall be competent to testify[] in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding . . . . However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code."

Evidence Code section 1040 establishes a qualified privilege for official information. Official information is "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) The holder of the privilege is the public entity, which has "a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice . . . ." (Evid. Code, § 1040, subd. (b).)

Here, the holder of the privilege is the mediator. The proper procedure in assessing whether the qualified privilege should apply to bar the proffered evidence is to allow the party to call the mediator and have her sworn as a witness. When, and if, the mediator asserts the privilege, the court must then engage in the weighing process described in the statute. None of this occurred because the court erroneously relied upon inapplicable statutes.

The error, however, was harmless, i.e., it was not reasonably probable that a result more favorable to appellant

would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) The purpose of the proffered testimony was to impeach G.K.'s testimony and her reports to DHHS that appellant abused A.K. by showing that G.K. never made such reports prior to the family law order that awarded appellant custody of the minors. However, G.K. testified she did report the abuse to police in the aftermath of the fights with appellant prior to the time appellant filed for divorce. Further, A.K. herself testified she was physically abused by appellant and the court observed that A.K. displayed obvious fear of appellant. Finally, B.K.'s testimony corroborated aspects of both G.K.'s and A.K.'s testimony. Moreover, although B.K. absented himself from the home to avoid being involved in the violence, he too was fearful and had been subjected to appellant's controlling behavior.

II

Appellant contends substantial evidence does not support either the juvenile court's finding that returning the minor to appellant would be detrimental to her or the juvenile court's order awarding sole legal and physical custody of the minor to the mother.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing evidence, the reviewing court must determine if there is any substantial evidence--that is, evidence which is reasonable, credible and of solid value--to support the conclusion of the trier of fact.

(*In re Angelia P*. (1981) 28 Cal.3d 908, 924; *In re Jason L*. (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

a. *Removal*

The juvenile court may not order a minor removed from the home unless the court finds by clear and convincing evidence "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (Welf. & Inst. Code, § 361, subd. (c)(1).)

The court made extensive findings to support removal and found appellant lacked credibility. The findings of ongoing physical abuse of A.K. and G.K. were well supported by the testimony at trial and evidence in the social worker's reports. Appellant's outburst following the court session and G.K.'s response was further evidence of appellant's continuing attempts to dominate through threats. Appellant's excessive gift-giving at visits fostered the kind of expectations in E.K. that would

lead to the control he used when abusing the other family members. The court correctly concluded that it was a matter of time before E.K. became his next victim.

Appellant's reaction to the social worker when counseled on the gift-giving issue, his ongoing abusive behavior and his insistence that everyone else was not being truthful about events in the home make it clear that there was no reasonable means to protect E.K. if she were returned to his custody, since nothing less than constant in-home monitoring would be effective.

b. *Award of Custody*

"Although both the family court and the juvenile court focus on the best interests of the child[,] significant differences exist. In juvenile dependency proceedings the child is involved in the court proceedings because he or she has been abused or neglected. Custody orders are not made until the child has been declared a dependent of the court . . . . The issue of the parents' ability to protect and care for the child is the central issue. The presumption of parental fitness that underlies custody law in the family court just does not apply to dependency cases. Rather, the juvenile court, which has been intimately involved in the protection of the child, is best situated to make custody determinations based on the best interests of the child without any preferences or presumptions." (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712; accord, *In re Chantal S.* (1996) 13 Cal.4th 196, 200-201, 206.)

Here, the evidence showed that G.K. had cared for both minors for a year prior to this proceeding without any incident of domestic violence or abuse. The minors were well cared for in G.K.'s custody, and E.K.'s sibling was in G.K.'s custody. The evidence also supported the juvenile court's findings that appellant perpetrated physical abuse on A.K. and G.K. and his behavior placed E.K. at risk. There was substantial evidence that awarding sole custody of E.K. to G.K. was in E.K.'s best interests.

DISPOSITION

The judgment of disposition and orders terminating the dependency and awarding sole custody of E.K. to G.K. are affirmed.

DAVIS, J.

We concur:

SCOTLAND, P.J.

SIMS, J.